STATE OF MICHIGAN

COURT OF APPEALS

ROBERT ALLAN PARENT, Plaintiff-Appellee,	UNPUBLISHED May 24, 2011
v	No. 300000 Oakland Circuit Court Family Division
BARBARA LEIGH PARENT, Defendant-Appellant.	LC No. 2006-726808-DM t

Before: SAWYER, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by right the trial court's August 11, 2010 opinion and order granting plaintiff's motion that the parties' children attend public schools.[1] We affirm.

Three standards of review apply in child custody cases. *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). We defer to the trial court's determinations of credibility, and the trial court's findings of fact will be affirmed unless the evidence clearly preponderates in the opposite direction. *Id*. The trial court's ultimate decision is reviewed for an abuse of discretion in light of the overriding mandate of the child's best interests. *McIntosh*, 282 Mich App 475. The court abuses its discretion when its decision is so grossly contrary to fact and logic that it evidences perversity of will, defiance of judgment, or the exercise of passion or bias. *Berger*, 277 Mich App at 705-706.

Defendant first argues that the trial court erred by not requiring that plaintiff establish the best interests of the children by clear and convincing evidence. We find this issue baffling

[1] Although the evidence presented to the trial court primarily concerned the parties' seven-year-old daughter, the court also applied its ruling to the parties' five-year-old daughter. The court entered an order on September 8, 2010, implementing its ruling for both children.

because the trial court in its opinion in fact stated it would require plaintiff to provide clear and convincing evidence to satisfy his burden of proof, yet its analysis appears to be based on the preponderance of the evidence. We conclude, however, the trial court erred if it applied the clear and convincing evidence standard because it is inconsistent with our prior decision in *Parent v Parent*, 282 Mich App 152; 762 NW2d 553 (2009). We held that the requested change from providing the children a home school education to a public school education would "not constitute a change of custodial environment," therefore, "the modification at issue here did not require the moving party to demonstrate clear and convincing evidence that the change is in the child's best interest; rather, the burden of proof . . . is a preponderance of the evidence that the change is in the child's best interest." *Id*. at 155.

Where, as here, parents have joint legal custody but are unable to agree on an important decision affecting the welfare of the child, the court must resolve the issue in the best interests of the child. *Id*. at 156. This requires that the trial court consider all factors enumerated in MCL 722.23 and "at least make explicit factual findings with regard to the applicability of each factor." *Parent*, 282 Mich App 157. Consequently, in our prior decision we remanded the matter to the trial court "to afford the trial court the opportunity to place on the record its findings regarding the [statutory] best interest factors . . . or, if necessary, a new hearing that may include consideration of up-to-date evidence." *Id*.

This Court's prior ruling regarding plaintiff's burden of proof on his motion for public schooling was the law of the case and binding on the trial court on remand. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). "[A] trial court may not take any action on remand that is inconsistent with the judgment of the appellate court." *City of Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). The law of the case will not be applied, however, where there has been a material or substantial change in the facts or if there has been an intervening change in the law. *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002).

The trial court may have read our Supreme Court's decision in *Pierron v Pierron*, 486 Mich 81; 782 NW2d 480 (2010), as an intervening change in the law requiring it to revisit the burden of proof issue. The *Pierron* Court held that when parents sharing joint legal custody are unable to agree regarding an important decision affecting the welfare of the child, a court must first consider whether the proposed change would modify the established custodial environment when resolving the dispute. *Id*. at 85. This is because a court may not change the established custodial environment of a child unless clear and convincing evidence shows that it is in the child's best interests. *Id*. at 86. A proposed parental decision that does not change the established custodial environment requires its proponent to prove only by a preponderance of the evidence that it is in the best interests of the child, using the factors identified in MCL 722.23. *Pierron*, 486 Mich 90-91. But on remand in this case, however, this Court had already decided that plaintiff's proposal for the children to attend public school would "not constitute a change of custodial environment." *Parent*, 282 Mich App at 155. The *Pierron* decision was not a change in the law that would permit the trial court to revisit this Court's ruling regarding the burden of proof. Thus, although the trial court erred if it applied the clear and convincing evidence standard, the error was harmless because it inured to defendant's benefit.

Defendant next argues that the trial court's findings of fact regarding the best interests factors of MCL 722.23 were against the great weight of the evidence, resulting in a decision regarding the minor children's education that was an abuse of discretion. We disagree.

The Child Custody Act (CCA), MCL 722.21 *et seq*., "applies to all circuit court child custody disputes and actions, whether original or incidental to other actions." MCL 722.26(1).

The trial court found the following best interests factors of MCL 722.23 were equal:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

The trial court determined the following statutory factors favored plaintiff:

> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (h) The home, school, and community record of the child.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

Finally, the court found that factor (i)—the reasonable preference of the child, if the court considers the child to be of sufficient age to express preference—did not apply and did not consider any issues under the catchall factor (l)—any factor considered by the court to be relevant to a particular child custody dispute. Defendant argues the trial court erred in its findings and conclusions for factors (a), (b), (c), (d), (e), (h), (i) and (j). Defendant also contends the court inappropriately focused on the parties instead of the children.

We have previously noted that because the issue here does not involve a change in the child's custodial environment, some of the best interest factors may not be relevant. *Parent*, 282 Mich App at 156. The *Pierron* Court agreed that "the best-interest factors are geared toward general custody determinations, and many of these factors are simply irrelevant to particular important decisions affecting the welfare of a child." *Pierron*, 486 Mich at 90. So, when a trial court determines that a particular factor is not relevant to the immediate issue, it need not make factual findings regarding that factor beyond this determination. *Id*. at 91.

Defendant argues that factor (a) should favor her because Emily's attending public school has harmed her relationship with her by lessening the time Emily previously spent in the home school setting. We disagree.

Defendant's argument only addresses the time she previously spent with Emily and does not address the love, affection, or other emotional ties existing between parents and child. The evidence did not show the change in schooling affected the emotional ties between the parties and the children. Rather, the testimony established that Emily loved both of her parents, and each parent participated in Emily's schooling, showing that they loved and cared for her. Thus, the trial court's finding that factor (a) is equal is not against the great weight of the evidence.

Defendant next challenges factor (b). The trial court focused on the religion element of this factor and again found the parties equal, explaining:

> Defendant testified she had attended First Baptist Church of Troy since 2007. She attends Sunday morning and evening and Wednesday afternoon. She also testified the children are involved in church activities. In January 2010, Emily was baptized there and both parents attended. Plaintiff testified that he attends church with the children. He discusses religion, morals, right and wrong, reads the Bible and prays with the children.

Defendant again argues that factor (b) should favor her because the change to public school has severely curtailed her ability to give Emily love and affection. Defendant also argues that ending home schooling hurts the children's education and religious training. We disagree.

Defendant's expert witness, Brian Ray, Ph. D., whose degree is in science education, testified that a home education setting is more conducive to teaching religious values. He further asserted that defendant's religion was an important part of her family life. In addition, defendant testified that she believed that it was easier to implement religious training of the children in a home school setting because there were aspects of religion "that can be woven into the academics that is not allowed in the public school setting." Nevertheless, requiring Emily's attending public school in no way prevents defendant, or plaintiff for that matter, from continuing to impart religious values and morals or from taking her to church services and other religious activities. Thus, in the case at bar, the court's finding regarding factor (b) is not against the great weight of the evidence.

Defendant next challenges the trial court's finding that factor (c), regarding the capacity and disposition of the parties to provide for the children's material needs, favored plaintiff. The trial court noted that "defendant did not make a good faith effort to be employed until her

spousal support ended" and that plaintiff provided all financial support. The financial strain on plaintiff would cause him to lose his home. Defendant and the children relied on defendant's 89-year-old mother for a home. Defendant argues that this factor should be equal because there was no evidence that she ever failed to provide for the children's needs. We disagree.

First, we note that when the issue was a change from one school to another 60 miles away, our Supreme Court observed that "disparity of income between the parties and [the] defendant's asserted failure to secure full-time employment might be significant if the issue before the court involved a change of custody, these considerations have little or nothing to do with the change-of-school issue." *Pierron*, 486 Mich at 90-91. Nevertheless, the trial court's factual finding that this factor favored plaintiff was not against the great weight of the evidence. *Berger*, 277 Mich App at 705. It also appears the trial court's findings on this factor were primarily used to modify a prior child support order.[2] We find no indication that the trial court accorded this factor undue weight in its decision regarding the children's education. "A court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances." *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006). We conclude that defendant has not established that the trial court erred, and even if the court erred by not ruling factor (c) was irrelevant, this conclusion would not affect the trial court's ultimate determination on the basis of other factors that it was in the children's best interests to attend public schools. In short, any error on factor (c) was harmless.

Defendant next challenges the trial court's findings that factor (d), the length of time the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity, and factor (e), the permanence as a family unit of the existing or proposed custodial home or homes, were equal. Regarding factor (d), the court noted that the children had lived with defendant since birth and "public schooling would not change the home environment for the children." Regarding factor (e), the court stated, "This factor is not impacted by the public schooling of the children." Defendant contends that home education was the established educational environment that should not have been disrupted. We disagree.

According to defendant's testimony, Emily spent two years being home schooled: one year was akin to preschool; the second year was kindergarten. Then, Emily spent first and second grade in public school, i.e., throughout the course of this litigation. Thus, at the point the trial court made its decision, it was not against the great weight of the evidence for the court to find factor (d) equal. Regarding factor (e), which addresses the actual family unit, the court found a change in schools would have no effect on Emily's family unit. As the trial court stated, defendant would still have primary custody while plaintiff would exercise parenting time, and, furthermore, neither party appeared to have plans to remarry. Thus, this factor would be at least

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[2] Pursuant to the trial court's discussion on this factor, the court issued an order for modification of child support on September 8, 2010. This is a separate order from the order entered the same day regarding the children attending public school. See n 1, *supra*.

equal if not irrelevant, and the trial court's decision that the parties are equal is not against the great weight of the evidence.

Defendant next challenges the two critical factors that the trial court found favored public schooling: factors (h), the home, school, and community record of the child, and (j), the willingness and ability of the parties to facilitate a close and continuing relationship between the child and the other parent. The trial court spent the greatest part of its analysis addressing factor (h) by reviewing the testimony of plaintiff, defendant, Ray, and Laura Dutcheshen, Emily's second grade teacher. The court considered three separate time periods: (1) home schooling and kindergarten, (2) first grade, (3) second grade. The court does not, for the most part, state which findings it was adopting as true, but the court appears to have found plaintiff's testimony more credible. After weighing all the testimony, the court concluded regarding factor (h), and, it seems, the case in general[3]:

> This case has been litigated in the trial court and the Court of Appeals for two years. The parties have drawn "a line in the sand" regarding the school issue. There is no compromise between their positions. Plaintiff wants the child in public school. Defendant wants the child home, whether in home school or cyberschool. Defendant had attempted to participate in Emily's public school education but has sent the child numerous "mixed signals." She is not supportive of Emily's field trips and school functions. Emily has been absent or tardy an excessive number of times. Defendant has had a conflict with Emily's second grade teacher and has been excluded from the classroom.
>
> In spite of these concerns, Emily has adjusted well to public school. The public school environment also allows plaintiff to participate more fully in Emily's education. The close relationship with her father is enhanced by public school attendance. *In weighing the benefits to Emily, a strong relationship with both parents is paramount*. [Emphasis added.]

Defendant argues that factor (h) should favor her because no evidence showed that the public school Emily has been ordered to attend is superior to, neutral, or better in any way, than her home education program. Defendant contends that the trial judge relied on Dutcheshen, who, in defendant's view, was biased. According to defendant, contrary to the trial court's conclusions, defendant tried to work out the parenting time issue that arose when Emily began public school, but plaintiff refused. Defendant maintains that the status quo or established custodial educational environment was home education for the first two years and that public school had disrupted the continuity of her education. We disagree.

In light of the testimony of Dutcheshen and plaintiff that Emily was happy in school and progressing as expected, it seems clear that the court was not concerned that Emily's academic

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[3] Although factor (h) was not the last factor addressed by the trial court, the court did not include a separate conclusion section.

performance was only average or slightly above average in the public school whereas she might have done better with home education. The court instead determined that the fact that Emily would have a closer and better relationship with her father while attending public school was the overriding factor supporting the change in schooling. Given that the court accepted plaintiff's testimony on this point and credibility determinations are left to the trier of fact, *Berger*, 277 Mich App at 705, the trial court's findings are not against the great weight of the evidence.

Regarding factor (j), the willingness of the parties to facilitate a close relationship between the child and the other parent, the trial court simply cited testimony from both plaintiff and defendant that their communication had improved, but it did not further elaborate why this factor favored plaintiff. The court apparently relied on plaintiff's testimony. Much of the evidence pertinent to factor (h) was also relevant to factor (j).

Defendant argues that factor (j) should have been found her favor because the evidence showed that defendant did communicate with plaintiff regarding the home schooling on numerous occasions, and it was plaintiff who refused to fully discuss the issue or come to an agreement. According to defendant, she offered plaintiff extended phone calls with the girls and encouraged their relationship with their father by having them give gifts and cards on Father's Day, his birthday, and holidays. Defendant also informed plaintiff of the children's classes, activities, recitals, and awards, and encouraged his involvement, even inviting plaintiff to her home to use the pool. Defendant asserts that it was plaintiff's stated goal for Emily to go to public school in order to get Emily away from defendant. Defendant concludes that the court should not have focused on the ability of the parties to get along, but rather, it should have focused on Emily and whether her successful, two-year educational program should be stopped merely because plaintiff objected. We disagree.

Both parties testified that their communication has improved. In deciding this factor, the trial court relied on plaintiff's testimony that his participation in Emily's schooling increased, and his relationship with Emily improved with her attending public school. Plaintiff's testimony differed from defendant's regarding his inability to participate in home schooling because of lack of communication or otherwise. However, credibility determinations are left to the trial court, *McIntosh*, 282 Mich App at 474, and it is clear based on the court's discussion regarding factor (h) and more briefly, factor (j) that the court agreed that public schooling allowed for a stronger relationship between plaintiff and Emily and that the relationship had been hampered when Emily was home schooled. Thus, we conclude the trial court's finding that factor (j) favored plaintiff was not against the great weight of the evidence. *Berger*, 277 Mich App at 705.

Finally, regarding factor (i)—the reasonable preference of the child, if the court considers the child to be of sufficient age to express preference—the trial court did not interview the children *in camera*. Relying on *In re HRC*, 286 Mich App 444, 451; 781 NW2d 105 (2009), the trial court believed such interviews were limited to determining a minor's custodial preference.

Defendant's entire presentation in her brief on his factor consists of two sentences: "Ms. Parent believes her children prefer to be home educated. The children were not interviewed by the trial judge." Defendant fails to cite any part of the record with respect to proceedings on this factor other than the trial court's one-paragraph explanation as to why it believed it was not

relevant. Also, defendant cites no legal authority and presents no argument at all that the trial court erred. Rather, defendant merely states her belief and makes a statement.

"An appellant's failure to properly address the merits of an assertion of error constitutes abandonment of the issue." *Begin v Mich Bell Telephone Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009). The proper presentation of an issue on appeal requires that an appellant cite to the record for the factual basis underlying a claim, as well as cite legal authority supporting the merits of his or her argument. *Id*.; *Woods v SLB Property Mgt LLC*, 277 Mich App 622, 625-626; 750 NW2d 228 (2008). Thus, an "appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for those claims." *DeGeorge v Warheit*, 276 Mich App 587, 596; 741 NW2d 384 (2007). As our Supreme Court has explained:

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." [*Goolsby v Detroit*, 419 Mich 651, 655, n1; 358 NW2d 856 (1984), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

We may disregard preservation and presentation requirements "if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). While none of these exceptions applies here, we briefly discuss the issue.

The trial court read too much into *In re HRC*, which involved whether an *in camera* interview of a child would violate a parent's right to due process in a proceeding to terminate parental rights. The Court observed that when making a determination regarding the best interests of the child in a custody dispute, "it is well settled that [a court] may interview the children in camera limited to determining their parental preferences." *In re HRC*, 286 Mich App at 451. But in a case involving a parental dispute as to which of two public schools children should attend, this Court held the trial court "clearly erred on a major legal issue when it refused to consider the reasonable preferences of the children under factor i, MCL 722.23(i)." *Pierron v Pierron*, 282 Mich App 222, 258; 765 NW2d 345 (2009). Our Supreme Court agreed, finding that the trial court improperly required that a child's preference have a factual basis and opining that "factor i does not 'require that a child's preference be accompanied by detailed thought or critical analysis' and that the 'reasonable preference' standard merely 'exclude[s] those preferences that are arbitrary or inherently indefensible.'" *Pierron*, 486 Mich at 92, quoting *Pierron*, 282 Mich App at 259. Thus, the trial court clearly erred when it concluded that it could not conduct an *in camera* interview of the children to consider their reasonable preference if it determined they were "of sufficient age to express preference." MCL 722.23(i).

For a number of reasons, however, we conclude the trial court's legal error regarding factor (i) does not warrant reversal. As noted already, defendant failed to properly address the merits of any error which constitutes abandonment. Furthermore, the facts and circumstances of the present case differ significantly from those in *Pierron*. First, the *Pierron* children were

several years older and already attending public school. In contrast, here the youngest child had not yet started school, and the oldest child was just entering first grade when the issue was first decided. Second, the trial court interviewed the *Pierron* children and their parents agreed that the children preferred one school over another, but the trial court ruled the children's preference lacked a factual basis. Here, the trial court did not interview the children, believing instead that their preference was not at issue. Finally, and most importantly, the present case differs from the circumstances in *Pierron* because in that case the children expressed their preference as between two public schools. Here, the children's choice was staying at home with mother or attending a public school. Given the young ages of the children, we believe the children's preference in this situation would carry little weight in determining what is in their best interest. In light of the trial court's findings regarding factors (h) and (j), we conclude any error regarding factor (i) was harmless.

We affirm. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.201.We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Karen M. Fort Hood